

John Sexton  
Communications Regulatory Policy Manager  
Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET

3 December 2010

Dear Mr Sexton,

**Re: Implementing the revised EU electronic communications framework**

I am writing to provide the Advertising Association's response to the Department for Business, Innovation and Skills (BIS) consultation on the implementation of the revised EU electronic communications framework. The Advertising Association is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media.

We are greatly encouraged by the BIS paper which outlines plans to reduce the regulatory burden in the UK wherever possible. We are supportive of the approach to ensure that the transposition of the Directives is done in a proportionate way and does not lead to gold plating.

The Advertising Association has particular concerns about the e-Privacy Directive and specifically article 5(3) which threatens to require user consent for cookie use. It is this issue which we would like to reference in this letter.

**User consent for cookies**

As we have discussed with civil servants in BIS over the last few months, the Advertising Association is concerned about the revised e-Privacy Directive and the suggested introduction of an automatic requirement for user prior 'consent' for cookies. Many of our members have also communicated to BIS their serious concerns about the impact that this would have on the online advertising sector. As such, the advertising industry welcomed BIS's statement made in November 2009 that supported a non-restrictive approach to implementation of the e-Privacy Directive.

This Article (5.3), if interpreted in a strict way, could place EU businesses at a significant competitive disadvantage. An overly strict interpretation of the revised e-Privacy Directive could severely disrupt a range of online business models including the publishing, e-commerce and advertising sectors, as well as disrupt the consumer's overall online experience.

We are, therefore, supportive of BIS's statement that cookies are not "dangerous" and the general approach that BIS has with regard to cookies. Cookies are essential for many online services and provide the users with personalised products and helpful session management.

The Advertising Association believes that, in the interest of both consumer rights and the internet's effective functionality, user consent for internet cookies can be reasonably established through browser settings. Industry will continue to work with browser manufacturers to ensure that consumers have effective controls over cookie use.

### **Self-regulation**

The advertising industry believes that there is a need to ensure that consumers have a greater understanding about how cookies are used and, indeed, what cookies are. We support industry-led initiatives that promote consumer understanding about cookies and explain how they facilitate an improved online experience for consumers.

The industry is currently working to develop online controls that enable consumers to have greater control over cookie use for Online Behavioural Advertising (OBA). This shows industry working to address concerns about OBA by working to provide consumers with effective control over cookie use without undermining the viability of the internet by enforcing an unworkable automatic opt-in requirement for all cookies. This self-regulatory approach was supported by Office of Fair Trading when looking at behavioural advertising.

The Advertising Association supports the approach detailed by BIS to encourage self-regulation in the field of advertising, and is keen to reference the work being undertaken by industry in the area of OBA as an example of how self-regulation can better address changes of technology and commercial practices. We believe that this process will address the concerns raised by some regarding user control of cookies for behaviourally targeted advertising, and we hope that BIS can continue to support this type of industry-led initiative.

As well as this developing EU model, in the UK the Internet Advertising Bureau (IAB) have launched a number of initiatives that show how the online advertising industry is effective in responding to consumer concerns about online business practices. For example, the IAB launched its Good Practice Principles for online behavioural advertising in 2009 which has been effective in ensuring best practice by companies that collect and use data for online behavioural advertising purposes. Furthermore, the IAB's [www.youronlinechoices.com](http://www.youronlinechoices.com) website has been very successful in helping consumers understand online behavioural advertising.

There may be a need to consider further self-regulatory and technical initiatives covering some of the other uses of cookies captured by Article 5(3). However, such initiatives take time to develop and would not be completed before the implementation deadline in May 2011, which in the meantime will lead only to industry uncertainty about how to comply with the new law in practice. In this context, we would ask BIS, and the ICO, to take a flexible approach with respect to transposition and enforcement of Article 5.3 in order to allow time for industry-led and practical pan-EU self-regulatory solutions to be explored.

### **Conclusion**

The Advertising Association supports the BIS approach to the implementation of this Directive through directly copying out the relevant wording of Article 5(3). This is the most effective way of ensuring that automatic opt-in is not required for all cookies and, in doing so, enable the internet economy to grow and prosper.

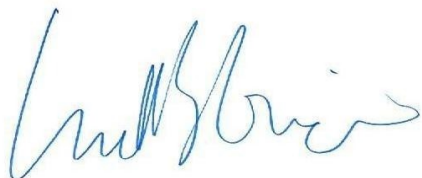
However, we would strongly encourage the Government to include appropriate elements of Recital 66, those which refer to allowing user settings of browser software to be a valid consent method, in the implementing regulations. In our opinion, this would not be gold-plating the amended Directive, as Recital 66 provides useful clarification of the text of the amended Article in the Directive.

In this context, we support the government's commitment to avoid specifying lists of approved cookies at the expense of others yet to be developed but rather to look to self-regulation. The Advertising Association believes that self-regulation works because it ensures that business can quickly adapt to changing circumstances, technologies and commercial practices.

We support the view held by BIS that the e-Privacy Directive does not require websites to obtain prior consent for cookies to be placed on users' terminals, and note that this view is also held by Alexander Alvaro, European Parliament deputy. Alvaro makes the point that "had the Parliament intended the placing of all cookies on a user's terminal to require "prior" and / or "explicit" consent, it would have adopted search language, consistent with the other occurrences of such terms elsewhere in the text and it would not have adopted the language of Recital 66 as it currently appears in the Directive." We believe that this is consistent with the approach set out by BIS.

As stated above, we believe that self-regulation can better address changes of technology and commercial practices. As such we look forward to continuing to work with BIS and the ICO to ensure that consumers can continue to take advantage of the great benefits that the internet offers while at the same time ensuring that consumer privacy is protected. Therefore, as BIS supports a user-friendly approach to implementation, as was also called for in Recital 66 of the Directive, we welcome the BIS implementation plan as set out in their paper. We would ask BIS to urge its counterparts in other member States to do undertake a similarly user-friendly approach when implementing this Directive.

Yours sincerely,



William Blomefield  
Regulatory Affairs Manager